In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 816

GOVERNMENT EMPLOYEES INSURANCE CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner issued an automobile liability insurance policy upon a privately owned vehicle to a government employee who was subsequently involved in an automobile collision while using his automobile in the scope of his employment. Suit was brought by the other party to the collision against the United States under the Federal Tort Claims Act (28 U.S.C. 1346(b)) and the Government Drivers Law (28 U.S.C. 2679). After formally tendering defense of the suit to petitioner (who denied any obligation to defend), the government impleaded petitioner as a third-party defendant on the ground that the policy defined the term "insured" to include "any person or organization legally responsible for the use [of the auto-

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mobile]," and the United States was so responsible under the applicable federal statutes. The claim against the United States was subsequently compromised by agreement of all parties (including petitioner) (R. 16), and the district court awarded judgment for the United States against petitioner on its third-party complaint (R. 13–14). The court of appeals affirmed on the ground that the United States was entitled to the benefits of the policy because it was included in the policy's definition of "insured" (Pet. App. 23–29; 349 F. 2d 83).

The decision below does not warrant review by this Court since it involves only the interpretation of the particular insurance contract at issue. The fact that the same definition may be commonly used in the trade as a so-called "omnibus clause" does not render its construction a substantial federal question requiring consideration by this Court. Petitioner and other insurers may, if they choose, avoid such liability in the future by doing as the court of appeals suggested (Pet. App. 28) and appropriately amending the clause.[1]

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[1] Petitioner is wrong in maintaining (Pet. 16–18) that State financial responsibility laws would bar amendment of the clause at issue here. Those statutes require only that those who operate the insured vehicle be adequately covered, not that the insurance extend to persons who are vicariously liable. In any event, the statutes are designed to assure that someone will be financially responsible for injuries caused by the insured vehicle. They would not be violated by an endorsement excluding the United States from coverage wherever Congress has provided that the United States shall be responsible for such damage. See *Jenkins* v. *Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P. 2d 145, 147. In *Myers* v. *United States*, 241 F. Supp. 515, 519 (N.D. Tex.), upon which petitioner mis-

In any event, the decision of the court of appeals was correct. The Government Drivers Law, 28 U.S.C. 2679, neither expressly nor impliedly deprives the United States of any rights it has to recover over against third parties who may be liable in tort or contract. In the present case, petitioner assumed a contractual obligation to "any person or organization legally responsible" for the automobile's use, and, under a consistent course of decisions, the United States, as employer of the automobile operator, qualifies under those terms. See *Rowley* v. *United States*, 140 F. Supp. 295 (D. Utah); *Prom* v. *United States*, 148 F. Supp. 25 (D. S.D.); *Nistendirk* v. *McGee*, 225 F. Supp. 881 (W.D. Mo.); *Nistendirk* v. *United States*, 225 F. Supp. 884 (W.D. Mo.); *Vaughn* v. *United States*, 225 F. Supp. 890 (W.D. Tenn.); *Gahagan* v. *State Farm Mutual Automobile Ins. Co.*, 233 F. Supp. 171 (W.D. La.); *Patterson* v. *United States*, 233 F. Supp. 447 (E.D. Tenn.); *Barker* v. *United States*, 233 F. Supp. 455 (N.D. Ga.); *McCrary* v. *United States*, 235 F. Supp. 33 (E.D. Tenn.).[2] The claim

takenly relies, the United States was held not to be an additional insured because the policy did not cover business driving.

[2] In *McCrary*, which appears at Pet. App. 37–47, the district court disagreed with the earlier decisions but nevertheless followed them "[f]or the sake of uniformity." The other cases relied upon by petitioner—*United States* v. *Gilman*, 347 U.S. 507; *Uptagrafft* v. *United States*, 315 F. 2d 200 (C.A. 4), certiorari denied, 375 U.S. 818; and *Perez* v. *United States*, 218 F. Supp. 571 (S.D. N.Y.)—do not support its position. *Gilman* held that the United States was not entitled to indemnification from an employee whose conduct had given rise to liability under the Tort Claims Act. *Uptagrafft* held that an employee and his insurer were not entitled to indemnifica-

that petitioner was deprived by government participation of its right to control the litigation is patently unsound when, as here, it rejected the request of the United States that it direct the litigation.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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tion from the United States. *Perez* held that the Government Drivers Law barred all suits against the employee, not merely those which duplicated actions in other jurisdictions.

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vs.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's brief, or Memorandum in Opposition to the Petition for Writ of Certiorari, is pregnant with things unsaid. It amounts to an agreement that this Court should review this case.

Rule 24 of the rules of this Court provides:

> "• • • Respondent shall • • • file • • • an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court. • • •"

As reasons for our Petition we set forth certain constitutional questions; conflicts with the principles annunciated

by this and other courts; the intent of the Congress; the novelty of the question because it has not been decided; the importance and widespread effects of the decision upon thousands of persons and on the orderly administration of justice; the violation of the statutory law of many states and the public interest. None of these reasons has been challenged by the Respondent, nor has the Respondent stated any other "matter or ground why the cause should not be reviewed by this Court". This is understandable because it should be of importance and relief to the Department of Justice to have a determination of this question in view of the hundreds of cases now pending and which will arise unless this Court takes jurisdiction.

The Respondent did make a few arguments on the merits of the case and in so doing made a serious mistake.

The brief says:

> "The claim against the U. S. was subsequently compromised by agreement of all the parties (including Petitioner) (R. 16),"

This is not true. The Petitioner was not a party to the action of the injured plaintiffs and intervenors versus the U. S. The U. S. assumed liability to the plaintiffs and the attorneys Harris (Asst. U. S. Attorney) and Murphy (for the plaintiff) agreed on a compromise settlement and judgment. This was done without the oral or written agreement of the Petitioner. That is confirmed by Mr. Harris' statement that the compromise was done merely with the knowledge of Mr. Tharp, but there is no suggestion of an agreement. (R. 16). Then:

> "THE COURT: (Addressing Mr. Tharp representing

the Petitioner) 'You are reserving your rights on your defense to the third party complaint against the government, is that correct?'

"MR. THARP: That is correct, yes sir." (R. 17)

There is a substantial federal question as to whether or not the U. S. may recover a judgment under an insurance policy with a standard form of omnibus clause found in practically all of the policies of automobile liability insurance issued to government employees covering the use of their private automobiles. This question has arisen, and will arise, in hundreds of cases under the present state of the law. Consequently, this Court's decision involves much more than the mere interpretation of a particular insurance contract as stated by the Respondent.

The Federal Tort Claims Act says the United States is liable for an employee's negligence if a private person would be liable under these circumstances, and it is liable to the same extent as a private individual would be under like circumstances. A private person who becomes an additional insured by virtue of the "omnibus clause" may not recover a judgment under some other named insured's insurance unless he complies with the terms and the conditions precedent to a recovery as set forth in the policy.

QUESTION: May the U. S. obtain a judgment over against an insurance company that issued a personal insurance policy to an employee if the U. S. cannot and does not comply with the terms as conditions precedent to a recovery by a private person?

The Respondent's brief begs the question or ignores it, and states that the elimination of or an amendment to

the omnibus clause is the way to exclude liability to the U. S. If this were done, it would violate the statutory law of most of the states which require such a clause to be a part of every automobile liability policy. Also, if that clause were expunged, those statutes say that the statutory provisions extending coverage to a person liable for the use of the automobile would continue to be an integral part of the policy of insurance.

The brief says the statutes do not deprive the United States of the right to recover from parties who may be liable in tort or contract. The Tort Claims Act makes the United States *exclusively* liable for any loss resulting from a government employee's negligence. The right to recover under an employee's personal insurance policy is contrary to the intent of the Congress and the principles of *U. S. vs. Gilman,* 347, U. S. 407, and other cases. In view of that decision and the investigation of liability insurance by the Congress, it was not intended that the United States should have a right over against an insurance company. But, even so, the Congress would have been constitutionally powerless to grant the Respondent the right to a judgment under another's private contract, without compliance with the terms of that contract. The Congress may not change or destroy the terms and conditions of a written contract between an insured and an insuror. The terms and conditions of a private contract between an automobile owner and an insuror are valuable property rights. Their elimination or destruction to permit the United States to recover a judgment against an insurance company is the taking of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

A reading of the cases cited should make it evident that review by this Court is imperative. Those cases are incomplete in the consideration of all the terms of a standard policy of insurance, and, for the most part, merely consider one clause, namely the "omnibus clause," but do not impose any responsibility on the U. S. to comply with the terms of the policy as would be required of any private person who became a third party beneficiary of some other party's contract of insurance.

The Respondent makes a surprising claim that the Petitioner rejected the request of the United States that it direct the litigation. The Federal Tort Claims Act and 28 U.S.C., Section 507, provide:

S 507. Duties; supervision by Attorney General.

"(a) Except as otherwise provided by law, it shall be the duty of each United States Attorney, within his district, to: * * *

"(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned; * * *

"(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party, * * *"

The Tort Claims Act also provides that only the Attorney General may enter into a compromise arrangement. The latter certainly could not delegate any authority to the Petitioner or its attorneys and the suggested supervision by the Petitioner would be nothing more than that of an observer and certainly that is not in compliance with the contract provisions of the insurance policy.

We believe that it is urgent and important that this Court determine the questions presented in the Petition.

January, 1966

Respectfully submitted,

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